

**E. The Anticompetitive Effects  
of the Challenged Agreements**

Although extensive market analysis is unnecessary in this case, the evidence will show that the CFA has market power and that the challenged agreements have caused actual competitive harm in the marketplace.

The evidence -- both direct and indirect -- will show that the CFA has substantial market power over the telecast rights to college football games.<sup>32</sup> Together, the members of the CFA possess a considerable market position, a position that is even stronger in some segments of the market.<sup>33</sup> The collective competitive strength of the CFA is confirmed by wide industry recognition. Its market position is well-insulated by the existence of substantial barriers to entry.

Moreover, the CFA's market power is directly evidenced by the successful exercise of that power to achieve the same adverse effects found in Board of Regents -- although on a smaller scale. That is, the challenged telecast agreements have increased the prices of college football telecast rights, restricted the amount of college football on television and limited the telecasters' choice of games. As a result, the viewers of college football

---

<sup>32</sup> The existence of a college football telecast market has been confirmed by five courts, including the Supreme Court, in the course of two separate lawsuits, Board of Regents and Regents of Univ. of Calif. A third case considered but did not resolve the issue. INTV, supra note 29.

<sup>33</sup> Indeed, because the CFA members have intentionally restricted their output, their nominal market share undoubtedly understates their actual market power.

telecasts have been injured, and overall college football viewership has been reduced.<sup>34</sup>

**VI. AS A CO-CONSPIRATOR, CAPITAL CITIES HAS VIOLATED SECTION 5**

Capital Cities through ABC and ESPN has engaged in seven exclusive agreements with CFA to telecast CFA football games.<sup>35</sup> Capital Cities is a co-conspirator with the CFA for each of these agreements.

**A. Parties to Unlawful Agreements Are Co-Conspirators**

Parties to anticompetitive agreements may be found liable as co-conspirators; in fact, both suppliers (CFA schools) and distributors (Capital Cities) agreeing to an exclusive distributorship are commonly named as co-defendants in antitrust suits.<sup>36</sup> See e.g., Fragle & Sons Beverage Co. v. Dill, 760 F.2d

---

<sup>34</sup> It is not necessary to show an effect in the advertising market, which is a level removed from the market in which television networks, syndicators, cable operators and local stations compete for college football telecast rights. Indeed, it is unusual to be able to trace anticompetitive effects beyond the primary level of injury. Nevertheless, the evidence does indicate that prices would be lower in the advertising market if the colleges competed in the sale of telecast rights.

<sup>35</sup> ABC had exclusive network agreements with CFA covering the 1984 CFA games and one covering the games occurring in the 1985 and 1986 seasons. ESPN had exclusive cable agreements covering the CFA games for the same periods. ESPN also has an exclusive cable agreement for the 1987-90 seasons. Capital Cities has both the exclusive network CFA agreement (through ABC) and exclusive cable agreement (through ESPN) for the 1991-95 seasons.

<sup>36</sup> Although Capital Cities stands in a vertical relationship with the CFA schools, the legal standard for judging the reasonableness of challenged, concerted conduct does not vary  
(continued...)

469 (3rd Cir. 1985); Com-Tel, Inc. v. DuKane Corp., 669 F.2d 404 (6th Cir. 1982); Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc., 637 F.2d 1376 (9th Cir.), cert. denied, 454 U.S. 831 (1981). Indeed, ABC has twice previously been named as a co-conspirator for its exclusive television agreements with CFA. Regents of Univ. of Calif., 747 F.2d 511; Ass'n. of Independent Television Stations, Inc. v. CFA, 637 F. Supp. 1289 (W.D. Okla. 1986).

#### **B. Capital Cities Benefits From Exclusive Dealing**

Although, in order to find Capital Cities liable, it is not necessary to demonstrate how Capital Cities benefits from their exclusive agreements with CFA, the evidence will show that the agreements' effect is to reduce competition from other

---

<sup>36</sup>(...continued)  
according to the identity or status of the particular co-conspirator. For example, in United States v. General Motors Corp., 384 U.S. 127 (1966), various automobile dealers, acting through their trade associations, persuaded General Motors to prevent its dealers from selling to discount outlets. GM thereby joined the unlawful conspiracy, and its conduct was condemned under the per se standard. See also Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) (per se rule applicable to boycott claim against two public utilities, two gas pipeline companies, six manufacturers of gas burners, and a trade association representing all of the foregoing); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (per se rule applicable to retailer's participation in boycott conspiracy with multiple suppliers); Malley-Duff & Associates v. Crown Life Ins. Co., 734 F.2d 133 (3d Cir. 1984) (per se rule applicable to insurance company's participation in boycott conspiracy with multiple insurance agents), cert. denied, 469 U.S. 1072 (1984). Thus, the liability of both CFA and Capital Cities is rightly determined by applying the Commission's Mass. Board analysis.

telecasters, enlarge its own college football audience, and increase the price of advertising during college football.<sup>37</sup>

The network and time period exclusivity provisions obviously prevent other telecasters from competing with ABC and ESPN for viewers and advertising revenues.<sup>38</sup> Additionally, by purchasing the exclusive CFA package (and adding it to the exclusive Big Ten/Pac-10 package it already held), Capital Cities recognized that it would be able to reduce the number of college football network exposures, thus decreasing the available time for advertising and giving it the ability to charge college football advertisers a significant premium.<sup>39</sup>

---

<sup>37</sup> The evidence will show that the benefits that Capital Cities receives from its participation in the exclusive CFA agreements is not unintended: Capital Cities has continually sought college football exclusives for both ABC and ESPN. This conduct -- Capital Cities' seeking (and obtaining) the collective agreement of CFA schools to refuse to deal with other networks and to restrict their dealings with all other telecasters -- amounts to the activities of a boycott ringleader. Klor's, supra note 36 (one retailer received agreements from multiple suppliers that they would boycott a competing retailer).

<sup>38</sup> Moreover, the restrictions are beneficial to ABC in that, if the network's affiliates wish to show a CFA game at the time ABC is telecasting a CFA game, they must show the ABC game because no competing CFA game may be telecast during that period. Affiliates are thus deterred from preempting the network programming.

<sup>39</sup> Indeed, by aggregating the exclusive CFA package with previously acquired packages, Capital Cities can gain an anticompetitive advantage over competing telecasters. See Standard Oil Co. v. United States, 337 U.S. 293 (1949); Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1302-03 (9th Cir. 1982) (a single innocuous contract may belong to a pattern of contractual relations that significantly restrain trade in the relevant market), cert. denied, 459 U.S. 1009 (1982).

**VII. THIS SECTION 5 VIOLATION REQUIRES  
CONTRACT RESCISSION AND FENCING-IN PROVISIONS**

The CFA and Capital Cities should be ordered to rescind the ABC-CFA and ESPN-CFA 1991-95 television rights contracts, and appropriate fencing-in relief should be ordered as well.

**A. Contracts Should Be Rescinded**

In the district court decision in Board of Regents, Judge Burciaga wrote:

It is . . . necessary, in order to accord full relief, to declare the contracts which NCAA has entered into with ABC, CBS, and TBS to be illegal and therefore void and unenforceable.

546 F.Supp. 1276, 1326. The Board of Regents court sought to prevent the NCAA from receiving "yet another year of ill-gained profit under the network contracts." Id. at 1327. Similarly, the order in this case should require rescission of the CFA-Capital Cities contracts, to prevent the CFA and Capital Cities from benefitting from their anticompetitive activities.

**B. Fencing-In Provisions Should Be Ordered**

Given the CFA's persistent efforts to stifle competition -- despite repeated antitrust alarm signals -- it is appropriate that relief should also include a fencing-in provision.<sup>40</sup> Rather

---

<sup>40</sup> The FTC has "wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices . . . ." Jacob Siegel Co. v. FTC, 327 U.S. 608, 611 (1946). Accord FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952); Hospital Corp. of America v. FTC, 807 F.2d 1381, 1393 (7th Cir. 1986) ("[T]he Commission has a broad discretion, akin to that of a court of equity, in deciding what relief is necessary to cure a violation of law and ensure against its repetition."), cert. denied, 481 U.S. 1038 (1987).

(continued...)

than merely imposing a general prohibition against future anticompetitive contract provisions, the order should prohibit the CFA from entering into any television rights agreement for a ten-year period.<sup>41</sup>

#### VIII. ISSUES TO BE TRIED

The principal issues requiring litigation are:

1. Is it "inherently suspect" under the Commission's truncated rule-of-reason analysis for the CFA to allocate the price and quantity of all network telecasts and virtually all cablecasts of CFA games during key viewing hours, restrict the network exposure of CFA games to a single network, and impose appearance limitations and requirements on package telecast sales of CFA games?

---

<sup>40</sup>(...continued)

Thus, "courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." Jacob Siegel, supra at 613. "[R]espondents must remember that those caught violating the Act must expect some fencing in." FTC v. National Lead Co., 352 U.S. 419, 431 (1957).

<sup>41</sup> As counsel for the CFA schools argued in Board of Regents:

Under established antitrust doctrine, this Court is entitled to explicitly forbid NCAA from competing for the selling of pooled football television rights, at least for a reasonable period of time, to restore competition in the market . . . .

Plaintiffs' Response to NCAA's Motion to Modify Judgment at 2 (filed in W.D. Okla., July 9, 1984), Board of Regents.

2. Are any of the respondents' efficiency claims "plausible" and "valid" even after the Supreme Court has rejected them?

3. In addition to ordering respondents' contracts unenforceable, as the Supreme Court ordered for the 1982-85 NCAA-ABC contract, should the Commission also order fencing-in provisions to protect competition in the future?

Respectfully submitted,

*Stephen W. Riddell*

Stephen W. Riddell

*Casey R. Triggs*

Casey R. Triggs

*Deborah E. Klein*

Deborah E. Klein  
Counsel Supporting the  
Complaint

*David L. Hetrick*

David L. Hetrick  
Investigative Assistant

Dated: October 26, 1990

CERTIFICATE OF SERVICE

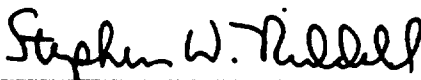
I hereby certify that on this 26th day of October, 1990, I have caused true and correct copies of the foregoing to be delivered by hand to:

A. Douglas Melamed  
Wilmer, Cutler & Pickering  
2445 M Street, N.W.  
Washington, D.C. 20037-1420

Lewis A. Engman, Esq.  
Winston & Strawn  
2550 M Street, N.W.  
Suite 500  
Washington, D.C. 20037

and to be delivered by overnight courier to:

Clyde A. Muchmore  
Crowe & Dunlevy  
1800 Mid-America Tower  
20 North Broadway  
Oklahoma City, OK 73102

  
\_\_\_\_\_  
Stephen W. Riddell



## **EXHIBIT C**

PRECLUSIVE EXCLUSIVE WINDOWS  
College Football: Saturday Afternoons

Conference	Time Blocks (EST)			
	Noon	3PM	6PM	10 PM
ACC (CFA)	Jefferson Pilot	ABC	ESPN	
SEC (CFA)	TBS	ABC	ESPN	
Big 8 (CFA)		ABC	ESPN	
SWC (CFA)	Raycom HSE	ABC	ESPN	
Big East (CFA)	BEFC Game of Week	ABC	ESPN	
Big Ten*	ESPN	ABC		
PAC-10**		ABC	ESPN/PTN	

\* Big Ten: ESPN's exclusive window runs from 12:30 to 3:30 PM EST.

\*\* PAC-10: ABC's window starts at 3:30 PM EST (12:30 PM PT) to 6:30 PM EST (3:30 PT). ESPN/PTN's window runs from 6:30 PM EST (3:30 PT) to 10:00 PM EST (7:00 PM PT).

Sources: NAB: Sports on Television: A New Ball Game for Broadcasters, 1990, at ppgs 57 - 99 Appendix E, F, G, H, I & J.

Comments of ABC at 10; Comments of Big East at 5-6; Comments of ESPN at 11 and exhibit C; Comments of South West Conference at 2-3; Comments of the Atlantic Coast Conference at 2-3.